

## § 790.5

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of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that “the employer shall not be so relieved” if such activities are so compensable;<sup>21</sup> it does not matter in such a situation that they are so-called “portal-to-portal” activities.<sup>22</sup>

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee’s agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;<sup>23</sup> or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.<sup>24</sup>

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, “preliminary” or “postliminary” activities which take place outside the workday “before the morning whistle” or “after the evening whistle” are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice

makes them compensable only during some other portion of the day.<sup>25</sup>

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

### § 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

... in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).<sup>26</sup>

This provision is thus limited to the determination of whether time spent in such “preliminary” or “postliminary” activities, performed before or after the employee’s “principal activities” for the workday<sup>27</sup> must be included or excluded in computing time worked.<sup>28</sup> If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,<sup>29</sup> then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice

<sup>21</sup> Section 4(b) of the Act (quoted in § 790.3).

<sup>22</sup> Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181–2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

<sup>23</sup> Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

<sup>24</sup> Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

<sup>25</sup> Conference Report, pp. 12, 13. See also § 790.12.

<sup>26</sup> The full text of section 4 of the Act is set forth in § 790.3.

<sup>27</sup> See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

<sup>28</sup> Conference Report, p. 13.

<sup>29</sup> See footnote 18.

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within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.<sup>30</sup> Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.<sup>31</sup> But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.<sup>32</sup> But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,<sup>33</sup> if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the

mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

### § 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.<sup>34</sup> Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.<sup>35</sup> The

<sup>34</sup>The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are \* \* \* not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

<sup>35</sup>See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the

<sup>30</sup>See Conference Report, pp. 10, 13.

<sup>31</sup>Conference Report, p. 10.

<sup>32</sup>Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

<sup>33</sup>See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

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